

January 16, 2019

Ms. Lisa Barton
Secretary of the Commission
United States International Trade Commission
500 E Street, SW
Washington, District of Columbia 20436

RE: *Certain Memory Modules and Components Thereof, Investigation No. 337-TA-1089*

Dear Ms. Barton:

ACT | The App Association requests leave to provide its public interest statement to the U.S. International Trade Commission's (USITC's) in the investigation entitled *Certain Memory Modules and Components Thereof* published in the Federal Register at 84 Fed Reg 57884.¹ The App Association represents more than 5,000 small technology development companies around the world that create leading software and hardware solutions. The ecosystem the App Association represents is valued at approximately \$1.7 trillion and provides 5.9 million American jobs. The App Association is the leading global representative for the small-business innovator community on law and policy in intellectual property matters, including with respect to patents. Our members develop and leverage patented technology to innovate and compete across sectors and use cases, driving the growth of the internet of things (IoT). As a global industry association with significant experience in patent and related competition law matters, the App Association respectfully offers our perspective to the USITC in evaluating the important public interest issues raised in this case.

On November 25, 2019, the App Association filed a timely public interest statement with USITC in this matter, which used formatting we in good faith believe adheres to the USITC's filing requirements for a public interest statement (and which was consistent with numerous previous public interest statements successfully filed with USITC made previously). The App Association successfully provided an electronic version via EDIS, and further adhered to the USITC's requirement for paper copies being filed, later receiving electronic confirmation of the filing being accepted. At no point was the App Association contacted by the USITC's Secretary's office regarding the sufficiency of this filing. During the week of January 6, 2020, the App Association reviewed the USITC's docket in this matter and realized that its filing was not appearing on the record. We contacted the Secretary's office via phone and were informed that our filing had been deemed procedurally insufficient. We are dismayed that the USITC's system would indicate acceptance of our filing when it was not accepted, and that we did not receive outreach to inform us of the Secretary's office's decision not to accept this filing. We therefore request leave to provide our public interest statement (appended to this motion) for the record in this matter.

The App Association is appreciative of the important issues being examined in this case, which we understand remains open. We still seek to provide our public interest statement to the record in the hopes that it will still be considered. We respectfully request leave to file the appended public interest statement to the record in this matter.

¹ United States International Trade Commission, *Request for Submissions on the Public Interest, Certain Memory Modules and Components Thereof*, 84 Fed Reg 57884 (October 29, 2019).

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Scarpelli', with a small dot above the final flourish.

Brian Scarpelli
Senior Policy Counsel

Alexandra McLeod
Associate Policy Counsel

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005

January 16, 2019

Ms. Lisa Barton
Secretary of the Commission
United States International Trade Commission
500 E Street, SW
Washington, District of Columbia 20436

RE: *Certain Memory Modules and Components Thereof, Investigation No. 337-TA-1089*

Dear Ms. Barton:

In response to the U.S. International Trade Commission's (USITC's) call for comments on public interest issues in the investigation entitled *Certain Memory Modules and Components Thereof* published in the Federal Register at 84 Fed Reg 57884¹ on October 29, 2019, ACT | The App Association² hereby submits comments to the USITC. The App Association represents more than 5,000 small technology development companies around the world that create leading software and hardware solutions. The ecosystem the App Association represents is valued at approximately \$1.7 trillion and provides 5.9 million American jobs. The App Association is the leading global representative for the small-business innovator community on law and policy in intellectual property matters, including with respect to patents. Our members develop and leverage patented technology to innovate and compete across sectors and use cases, driving the growth of the internet of things (IoT).

As a global industry association with significant experience in patent and related competition law matters, the App Association respectfully offers our perspective to the USITC in evaluating the important public interest issues raised in this case. The App Association urges careful consideration of our views and how the USITC's next steps will affect the U.S. small business innovators during this critical time of development and deployment for new fifth generation (5G)³ and IoT⁴ technologies based on open standards.

New 5G and IoT technology's role will be central to introducing new innovations and efficiencies across consumer and enterprise contexts. For example, in healthcare, a miniaturized and embedded connected medical device must have the ability to automatically communicate bidirectionally in real-time. This capability enables a healthcare practitioner to monitor a patient's biometric data and the patient to be able to communicate with a caregiver in the event of a medical emergency. Other uses, such as sensors deployed to alert security of an unauthorized presence, may only require the ability to send data to security professionals with minimal (or even no) capability to receive communications. Further uses are imminent, such as the rise of mobile technology and software apps in enabling America's first responders in a new planned national public safety broadband network.

¹ United States International Trade Commission, *Request for Submissions on the Public Interest, Certain Memory Modules and Components Thereof*, 84 Fed Reg 57884 (October 29, 2019).

² <http://actonline.org>.

³ While there is no universal definition for a "fifth generation" (5G) mobile network, the term encompasses the future wave of interoperable mobile networks being driven through various technical standards bodies today. 5G networks are expected to utilize a wide range of spectrum bands, both licensed and unlicensed, through new and innovative spectrum efficiencies and spectrum sharing arrangements. Standard bodies such as 3GPP and IEEE, among many others, continue to develop the requirements by early 2017. See Dino Flore & Balazs Bertenyi, *Tentative 3GPP Timeline for 5G, 3GPP THE MOBILE BROADBAND STANDARD* (Mar. 17, 2015), at http://www.3gpp.org/news-events/3gpp-news/1674-timeline_5g; see also IEEE Standards Association, *Internet of Things*, at <http://standards.ieee.org/innovate/iot/>.

⁴ Similar to 5G, IoT will involve everyday products that use the internet to communicate data collected through sensors. IoT is expected to enable improved efficiencies in processes, products, and services across every sector. In key segments of the U.S. economy, from agriculture to retail to healthcare and others, the rise of IoT is demonstrating efficiencies unheard of even a few years ago. See, e.g., Department of Commerce Internet Policy Task Force and Digital Leadership Team, *Fostering the Advancement of the Internet of Things* (Jan. 2017), available at https://www.ntia.doc.gov/files/ntia/publications/iot_green_paper_01122017.pdf.

While the App Association does not take a position as to the determination of either party's liability in this case, we are providing this public interest statement because App Association members rely on a competitive information and communications technology hardware environment, specifically with respect to standard-essential patent (SEP) licensing. Without it our members would be significantly hampered in providing countless Americans (both in the consumer and enterprise contexts) with leading edge software and hardware products and services that require an increasing amount of bandwidth and computing power to meet customer demands. As standardized technologies provide a baseline for the IoT innovations our members develop, the Initial Determination at hand stands to impact those opportunities by determining USITC precedent regarding the availability of exclusions orders in the case of SEP infringement.

In this case, we strongly urge the USITC to act consistent with, and to build upon, existing global-consensus guidance providing clarity on what fair, reasonable, and non-discriminatory (FRAND) commitments made on SEPs mean, and the effects of FRAND abuse on competition and innovation. To understand this global FRAND consensus, we urge the USITC to review a list of legal and policy developments related to SEP law and policy in the United States and in other key markets which is accessible at <https://actonline.org/wp-content/uploads/ACT-SEP-Gen-Position-Paper-sent-081619.pdf>. The developments covered in this resource illustrate to the USITC that there are many policy and legal developments in the United States (and elsewhere) that provide clarity from both contract and competition law perspectives supporting the enforcement of FRAND terms in standard development organizations' (SDO's) patent policies (including that of the Joint Electron Device Engineering Council [JEDEC]), which we believe should be considered and appreciated by USITC in this case.

USITC should recognize that SEP licensing abuse is both a contract and competition law issue (and an analysis underlying any exclusion order decision with respect to an SEP should address both of these areas). Further, consistent with existing law and precedent,⁵ exclusion orders pertaining to SEPs should only be issued in rare circumstances. Specifically, an exclusion order should only be considered when an infringing party/potential licensee is demonstrably acting unreasonable, is unwilling to take a FRAND license, and is acting outside of the scope of the SEP holder's voluntary FRAND commitment. The availability of such exclusion orders for SEPs can raise significant public health and safety, as well as competition, concerns, thus they should be used sparingly and only under extremely rare circumstances.⁶ Further, we note that SEP holders denied an exclusion order do not become disenfranchised as they have the ability to recover monetary damages through the courts and partaking in standards-setting activities in a SDO and agreement to voluntary licensing on FRAND terms per an SDO's patent policy represents an agreement that monetary damages are the proper form of relief for infringement save for extreme exceptions.

As noted above, the App Association does not take a position as to either party's liability in the case at hand, but urges the USITC to fully examine the potential effects it's decision will have on SEP licensing through potentially altering the availability of exclusion orders with respect to SEPs (and therefore the ability of the United States to compete in the growth of new IoT verticals using standards to compete and create jobs). Furthermore, the Commission should examine the impact any such shift would have on key stakeholders across countless consumer and enterprise use cases that rely on reasonable access to open standards. We believe that the USITC should carefully examine all the factors in this case and evaluate all interests involved or affected by a potential exclusion order to fully appreciate the impact on the public health and welfare in the United States, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

The App Association appreciates the opportunity to submit these public interest comments to the USITC's investigation.

⁵ Letter to the Honorable Irving A. Williamson, United States International Trade Commission Chairman re *Disapproval of the U.S. International Trade Commission's Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers*, Investigation No. 33-TA-794, (August 3, 2013) available at https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

⁶ The App Association notes that a party preserving its legal rights should not indicate unwillingness or unreasonableness.